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No. 84-1956 (3)

In The

Supreme Court of the United States

October Term, 1984

THE D.L. AULD COMPANY,
Petitioner,

v.

CHROMA GRAPHICS CORPORATION,
Respondent,

and

THE UNITED STATES,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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39 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the consensual reference provision of the Magistrates Act of 1979, 28 U.S.C. §636(c), meets constitutional standards?

2. Whether the Court of Appeals for the Federal Circuit abused its discretion in awarding $7,592.24 as attorney's fees to the Respondent?

PARTIES TO THE APPEAL IN THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Petitioner is D.L. Auld Company (hereinafter "AULD"), an Ohio corporation. It was the Appellant in the Court of Appeals.

The Respondent is Chroma Graphics Corporation (hereinafter "CHROMA"), a Tennessee corporation, which has one stockholder, Mr. Bobby Gene Goin. It was the Appellee in the Court of Appeals. The Respondent states that it has no parent companies or affiliates or subsidiaries that should be listed under Supreme Court Rule 28.1

The Intervenor is the United States.

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Respondent supplements Petitioner's verbatim listing of authority by including Rule 38 of the Federal Rules of Appellate Procedure.

> RULE 38. Damages for Delay
>
> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

FED. R. APP. P. 38.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34.2, CHROMA offers the following corrections to AULD'S Statement of the Case:

The characterization of the second issue in this case on page 14 of the Petition is too narrow because it ignores other reasons given for awarding attorney's fees. The second issue, correctly stated, is whether the Court of Appeals abused its discretion in awarding attorney's fees to CHROMA.

AULD'S Statement at pages 15 and 16 suggests that no oral argument was granted by the magistrate. This is incorrect. The magistrate did grant oral argument and followed a procedure designed to best preserve AULD'S rights. The magistrate's orders of October 22

and November 15, 1982 are included in AULD'S Appendix, but the October 29, 1982 order is missing. This missing order granted an oral hearing and is included in the Appendix to this brief. (Respondent's App. p.1).

AULD also failed to include in its Appendix a copy of its Petition in the United States Court of Appeals for the Sixth Circuit requesting the Court to Assume Supervisory Jurisdiction and Vacate the Judgment of the District Court. AULD'S Statement does not mention this Petition. The Petition is relevant to the award of attorney's fees and is included in the Appendix hereto. (Respondent's App. p.3).

AULD failed to mention in its Statement or include in its Appendix, a Motion for Continuance filed by AULD in the Federal Circuit on Friday November

20, 1984, requesting a continuance of the oral argument set for Wednesday December 5, 1984. This motion is also relevant to the award of attorney's fees and is included in the Appendix hereto. (Respondent's App. p.10).

The third paragraph on page 20 of the Petition and the arguments found in the Statement of the Case on pages 22-25 of the Petition are incorrect in their assertion that attorney's fees were awarded solely because the Federal Circuit found that AULD had no reasonable belief of prevailing on the constitutional issue. The Court cited several reasons for awarding attorney's fees that are not addressed in the Petition.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari as to the constitutionality of the Magistrates Act should be denied because twelve of thirteen Circuit Courts of Appeal have held that the statute is constitutional and this Court has denied review on certiorari in four of those cases.

The Petition for a Writ of Certiorari should be denied as to the award of $7,592.24 for attorney's fees because such award is authorized under 35 U.S.C. §285 in "exceptional cases". In addition, Rule 38 of the Federal Rules of Appellate Procedure provides for the award of damages in a frivolous appeal.

This case is exceptional because it is frivolous. The frivolous nature of the case is demonstrated by

the fact that AULD improperly raised an issue in this appeal that was finally decided against it in a prior appeal, and it improperly raised an issue on appeal that was not raised at the district court level. Furthermore, throughout the entire appeal process, AULD has pursued a procedural course that was, at best, unusual. For example, AULD filed an appeal to the Sixth Circuit knowing that the Federal Circuit had jurisdiction. These procedures have caused unnecessary expense and delay and are abusive of the judicial process.

In view of the frivolous grounds for the appeal and the unusual procedures followed by AULD, the Court of Appeals for the Federal Circuit did not abuse its discretion by awarding attorney's fees.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURTS OF APPEAL HAVE UNIFORMLY HELD THAT THE MAGISTRATE ACT MEETS CONSTITUTIONAL STANDARDS.

The Petition requests the Supreme Court to decide whether the consensual reference provision of the Magistrates Act of 1979, 28 U.S.C. §636(c), meets constitutional standards. This issue has been addressed by twelve Circuit Courts of Appeal including the Federal Circuit in the case now before the Court. All twelve of these Courts have held the Act to be constitutional. Furthermore, this Court has denied review on Writ of Certiorari on this issue in four prior cases. See Goldstein v. Kelleher, 728 F.2d 32 (1st Cir.), cert. denied, 105 S.Ct. 172 (1984); Collins v. Foreman, 729 F.2d 108

(2nd Cir.), cert. denied, 105 S.Ct. 218 (1984); Wharton-Thomas v. United States, 721 F.2d 922 (3rd Cir. 1983); Gairola v. Virginia Department of General Services, 753 F.2d 1281 (4th Cir. 1985); Puryear v. Ede's Ltd., 731 F.2d 1153 (5th Cir. 1984); KMC Co. v. Irving Trust Co., No. 83-5563 (6th Cir. March 4, 1985); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Lehman Brothers Kuhn Loeb, Inc. v. Clark Oil & Refining Corp., 739 F.2d 1313 (8th Cir. 1984) (en banc), cert. denied, 105 S.Ct. 906 (1985); Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir.) (en banc), cert. denied, 105 S.Ct. 100 (1984); United States v. Dobey, 751 F.2d 1140 (10th Cir. 1985); Fields v. Washington Metropolitan Area Transit Authority, 743

F.2d 890 (D.C. Cir. 1984); D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029 (Fed. Cir. 1985).

Because of the virtual unanimity of the Circuits, this is not a question which should be decided by the Supreme Court. The Petition for Certiorari as to the constitutionality of the Magistrates Act should be denied.

II. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY FEES IN THE AMOUNT OF $7,592.24.

The Petition requests this Court to review the propriety of awarding attorney's fees to CHROMA. This case was originally a patent infringement suit brought under Title 35 of the U.S. Code. The Federal Circuit awarded attorney's fees as authorized under 35 U.S.C. §285 which provides:

§285 Attorney Fees

> The court in exceptional cases may award reasonable attorney's fees to the prevailing party.

The legislative history of §285 and case law indicate that an award of attorney's fees under the statute is a matter of judicial discretion. See, e.g., Rohm & Haas Co. v. Crystal Chemical Co., 736 F.2d 688 (Fed. Cir.), cert. denied, 105 S.Ct. 172 (1984). Rule 38 of the Federal Rules of Appellate Procedure also empowers the courts of appeal to award "just damages" as a matter of discretion in a frivolous appeal. Thus, the question presented by the present Petition for a Writ of Certiorari is whether the Court of Appeals for the Federal Circuit abused its discretion under 35 U.S.C. §285 or under Rule 38 of the Federal Rules of

Appellate Procedure by awarding attorney's fees in this case.

The Federal Circuit cited several reasons for finding the case to be exceptional and abusive of the judicial process. The award of $7,592.24 is clearly not outside the bounds of its judicial discretion. Since the Petition addresses only one of the reasons cited by the Court for awarding attorney's fees, AULD apparently finds no fault in the other reasons given by the Court.

One of the stated reasons that the Federal Circuit awarded attorney's fees was that the appeal attempted to raise an issue that had been decided by the Federal Circuit in AULD'S prior appeal. In the prior decision, D.L. Auld Co. v. Chroma Graphics Corp., 714

F.2d 1144 (Fed. Cir. 1983), the Federal Circuit specifically rejected AULD'S contentions with regard to the magistrate's alleged failure to allow a proper oral hearing. AULD raised this same issue again in this appeal, and showed no awareness that the prior decision was the law of the case and made no attempt to show that the case was an exception to that doctrine. (Opinion, Petitioner's App. p.37). This attempt to relitigate the same issue previously decided by the Federal Circuit wastes the time of the courts and the litigants.

Another reason stated by the Court for the award of attorney's fees was that AULD argued on appeal that it did not consent to the reference to the magistrate. (Opinion, Petitioner's App. p.37). A written consent to the

reference was signed by AULD'S attorney, and at the time the consent was signed AULD was represented by three prominent law firms. The Court noted that this issue was not raised in AULD'S Rule 60(b) motion in the district court and held that, in any event, the argument was frivolous. (Opinion, Petitioner's App. p.37).

Another factor that supports the Court's award of attorney's fees is the filing by AULD of a meritless motion served on Friday, November 30, 1984, requesting a sixty day continuance of the Oral Argument before the Court of Appeals for the Federal Circuit which was scheduled for Wednesday, December 5, 1985. (Respondent's App. p.10). The reason for the requested continuance was that "[u]pon the issuance of the Reissue Patent, the referenced appeal will be

Moot." (Respondent's App. p.11). This motion was meritless because whether or not any reissue patent was granted, it is obvious that the appeal would not be moot. Later, AULD specifically recognized this fact in its Petition for Rehearing before the Federal Circuit stating as follows:

> The panel may have considered this alleged mootness in determining, sua sponte, that the appeal was frivolous.
>
> Such assumption would have been incorrect. Even if and when reissue Letters Patents are granted to appellant the case will not be moot because. . . .

(Petitioner's App. pp.53-54) (emphasis added). Thus, in its Petition for Rehearing AULD admits the lack of merit for its motion for continuance. It is submitted that the motion for continuance was for the purpose of delay.

AULD had previously attempted to delay the Appeal. In February, 1984,

it filed a petition requesting the Court of Appeals for the Sixth Circuit to exercise its supervisory authority over the District Court for the Eastern District of Tennessee. Then, on March 8, 1984, it filed an appeal to the Sixth Circuit Court of Appeals. Then, in response to CHROMA'S motion to dismiss the appeal, AULD stated that its petition to the Sixth Circuit to exercise supervisory authority was moot. (Petitioner's App. p.15). Throughout these proceedings, AULD knew well that the Federal Circuit had appellate jurisdiction over this case because it had appealed the case previously to the Federal Circuit. Ultimately, of course, the Sixth Circuit transferred the appeal to the Federal Circuit. It is submitted that the petition and appeal to the Sixth Circuit were for the purpose of

delay.

Even though the Federal Circuit cited several reasons for granting attorney's fees, the Petition for Certiorari suggests that the award was made solely because AULD was not likely to prevail on the constitutional issue regarding the Magistrates Act. Previously, however, AULD acknowledged that other reasons were given by the Court. In its Petition for Rehearing and Suggestion for Rehearing In Banc filed before the Federal Circuit, AULD recognized that "the panel in this case also labeled as 'frivolous' several of the issues raised by appellant." (Petitioner's App. p.50) (emphasis added). Also, AULD argued (1) that the consent issue was properly raised for the first time in the second appeal (Petitioner's App. pp.50-51), (2) that

the oral argument issue was properly raised for the second time in the second appeal even though it was decided in the first appeal (Petitioner's App. pp.51-53), and (3) that the panel should not have considered AULD'S Motion for a Continuance in awarding attorney's fees because the case would not be moot even if the Patent Office granted a Reissue Patent (Petitioner's App. pp.53-54). These arguments do not make much sense, and it is easy to understand why AULD would be reluctant to present them to this Court. However, by omitting these arguments, AULD has tacitly admitted that the Federal Circuit had at least three good reasons to award attorney's fees.

With regard to the likelihood of Auld prevailing on the constitutional

issue, the Federal Circuit was obviously correct. Given the numerous decisions holding that the Magistrates Act was constitutional, AULD really had no basis for believing it would prevail on this issue. This was but one among several factors considered by the Court in awarding attorney's fees. No one factor should be considered alone. The Federal Circuit recognized that a small company owned by one man in Knoxville, Tennessee, was being punished with needless legal expense forced upon it by a much larger competitor. All of the hopeless issues repeatedly raised by AULD, the meritless motions filed by AULD in the Sixth and Federal Circuits, the contradictory arguments presented by AULD and AULD'S misdirected appeal to the Sixth Circuit should be considered

to determine whether the Federal Circuit abused its discretion in awarding $7,592.24 in attorney's fees. Clearly, in view of all of the valid reasons for an award of attorney's fees, the Court did not abuse its discretion. A Writ of Certiorari should not be granted.

CONCLUSION

For the reasons given above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief were served by mailing three copies to Mr. John O. Henry of Porter, Wright, Morris & Arthur, 2100 First National Bank Building, Dayton, Ohio, 45402 and three copies to Mr. Harold Krent, Attorneys, Appellate Staff, Civil Division, Room 3348, Department of Justice, Washington, D.C. 20530 on the 24th day of July, 1985.

Andrew L. Neely

APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

THE D.L. AULD COMPANY,	)
	)
Plaintiff,	)
	)
v.	)No.
	)CIV-3-81-532
CHROMA GRAPHICS CORP.,	)
	)
Defendant.	)

O R D E R

It having come to the undersigned's attention that the plaintiff in this action requested an oral hearing on the defendant's motion for summary judgment, the undersigned hereby treats the plaintiff's motion to vacate the Order entered herein on October 22, 1982, as a timely motion to alter or amend judgment. Rule 59(e), Federal Rules of Civil Procedure. An oral hearing in this action is hereby set for

November 8, 1982, at 1:30 P.M.

ENTER: OCT 29 1982

Robert P. Murrian
UNITED STATES MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO.

Petition By D. L. Auld Company For This Court To Assume Supervisory Jurisdiction And Motion To Vacate Judgement Of The United States District Court For The Eastern District Of Tennessee

Pursuant to the supervisory power of this Court, petitioner respectfully requests that this Court vacate the order and judgement of the United States magistrate entered in The D. L. Auld Company v. Chroma Graphics Corporation, No. CIV-3-81-532 (E.D. Tenn Oct. 22, 1982), aff'd, 714 F.2d 1144 (Fed. Cir. 1983), granting summary judgement in favor of defendant Chroma Graphics Corporation. A copy of the magistrate's order and memorandum is attached as Exhibit A. Movant asserts that the magistrate's entry of final judgement pursuant to 28 U.S.C. §636(c) was an

unconstitutional exercise of jurisdiction in contravention of Article III of the United States Constitution. Furthermore, the magistrate's failure to follow a local rule of the district court which requires that litigants have the opportunity to orally argue summary judgement motions deprived movant of its right to be heard in the trial court and raises a serious question whether due process was ignored.

Movant recognizes that this is an unusual motion, but urges that this Court accept jurisdiction.[1] Petitioner believes there is clear precedent for this Court to consider this petition.

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1 A similar motion pursuant to Fed. R. Civ. P. 60(b) has been filed contemporaneously in the United States District Court for the Eastern District of Tennessee.

In Kinnear-Weed Corp. v. Humble Oil & Refining Co., 403 F.2d 437 (5th Cir. 1968) (en banc), cert. denied, 404 U.S. 941 (1971), the Court granted an "extraordinary petition" which it refused to further characterize wherein the petitioner sought to set aside the judgement of a district court rendered some twelve years earlier. The Court itself disposed of a direct appeal some ten years earlier. Coincidentally, the Kinnear-Weed case was a patent infringement case. The Court remanded to the district court for findings of fact on the issue raised by the motion, viz: whether the original trial judge had an improper interest in the outcome of the litigation. See also, Yanow v. Weyerhaeuser S.S. Co., 274 F.2d 274 (9th Cir. 1959), cert. denied, 362 U.S. 919 (1960).

The Court in Kinnear-Weed was concerned about a possible lapse of judicial independence having affected the outcome of a case. Judicial independence has always been viewed as a paramount consideration by the federal judiciary: indeed, judicial independence is mandated by the Constitution.

Article III protects the independence of the federal judiciary by providing lifetime tenure and secure compensation for federal judges. Judicial independence is the ultimate question raised by this petition. The absence of Article III attributes by magistrates is the reason why 28 U.S.C. §636(c) operates in an unconstitutional manner. Just as the Kinnear-Weed court took cognizance of a motion which raised the issue of the district judge's

independence some ten years after the judgement was affirmed on appeal, so too should this Court consider and decide the question raised by this petition.

In support of this petition, petitioner relies on its memorandum in support of the similar motion filed contemporaneously in the United States District Court for the Eastern district of Tennessee. A copy of said motion and memorandum are attached as Exhibits B and C to this petition. Petitioner urges the Court to adopt the reasoning of the panel in Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), reh. en banc granted October 20, 1983 (Nos. 82-3152; 82-3182), which found that the magistrate's exercise of Article III jurisdiction pursuant to §636(c) is unconstitutional.

The Court of Appeals for the Federal Circuit earlier had jurisdiction over this case by virtue of 28 U.S.C. §1295, which vests appellate jurisdiction in that Court in patent cases. Because this motion in no way relates to the patent aspects of the case, but challenges the jurisdiction of a judicial officer over whom this Court exercises supervisory power, the Court should not decline to hear this motion because of concern for comity or other like considerations.

In conclusion, petitioner asks this Court to vacate the order and judgement of the magistrate and remand this cause to the district court for further proceeding de novo consistent with dictates of Article III of the United States Constitution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was served upon Edwin M. Luedeka, Luedeka & Neeley, P.C. Suite 1230, First American Bank Building, 505 Gay Street, S.W., Knoxville, Tennessee 37902, by certified mail this 22nd day of February, 1984.

John O. Henry

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE D.L. AULD COMPANY, Appellant,	*	Appeal No. 84-1381
v.	*	
CHROMA GRAPHICS CORP., Appellee,	*	MOTION FOR CONTINUANCE OF HEARING DATE
and		
THE UNITED STATES, Intervenor		

Now comes THE D.L. AULD COMPANY, Appellant, by counsel, and moves this Court for an Order continuing the hearing presently scheduled for Wednesday, December 5, 1984 at 10:00 A.M., in Courtroom No. 3, for a period of 60 days;

For the reason that THE D.L. AULD COMPANY, Appellant, during the pendency of this appeal, has filed a narrowing Reissue Application with respect to the patent originally involved in this case, has cited all prior art, including that

previously reviewed by this Court, to the U.S. Patent and Trademark Office, represents that the Reissue Application has been allowed and that the Final Fee has been paid and awaits only the final printing and issuance of the Reissue Patent.

Upon the issuance of the Reissue Patent, the referenced appeal will become Moot.

WHEREFORE, Appellant respectfully submits that it would be an unnecessary use of valuable judicial time, as well as an unecessary expense to the attorneys and their parties to engage in an oral presentation and subsequent decision of this appeal when it is evident that the appeal will most probably become Moot within a relatively brief time.

Appellant submits a proposed Order granting a continuance of 60 days and requiring a further report of the status of the Reissue Patent at the conclusion of the 60 days in order that this hearing may either be rescheduled or dismissed as Moot.

Respectfully Submitted,

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